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DOC #:
DATE FILED: 8/11/08

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CHAMBERS OF
RICHARD M. BERMAN
U.S.D.J.

THE CITY OF NEW YORK
LAW DEPARTMENT
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MEMO ENDORSED

A pre-motion conference is set for 9/25 at 9:00 a.m. No motions prior to the conference.

SO ORDERED:
Date: 8/11/08 Richard M. Berman
Richard M. Berman, U.S.D.J.

BY HAND
Honorable Richard M. Berman
United States District Judge
Southern District of New York
500 Pearl Street
New York, New York 10007

Re: Paul Selinger et al. v. City of New York, et al., 08 CV 2096 (RMB)

Your Honor:

I am the Assistant Corporation Counsel handling the defense of this action on behalf of defendants City of New York. In accordance with the Court's Order of July 17, 2008, I write to supplement the pre-motion conference letter of the District Attorney's Office dated August 5, 2008, and respectfully request a pre-motion conference prior to filing a motion for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c). Defendant City would argue that 1) plaintiffs do not have a valid false arrest claim; 2) plaintiff's malicious prosecution claim fails as a matter of law; 3) plaintiffs fail to sufficiently plead a *Monell* claim; and 4) most of plaintiffs' state law claims are time barred or fail as a matter of law.

Only a few undisputed facts are needed to support defendants' proposed motion. Plaintiff Dr. Paul Selinger is a dentist that provided dental services for OMNI Medical Care/Clinic. Paul Selinger was initially indicted in January 2005, by a Grand Jury in Kings County Supreme Court of two counts of Scheme to Defraud in the First Degree pursuant to New York Penal Law §190.65(1)(a). Plaintiff Paul Selinger was arrested on March 22, 2005, based on the New York County Indictment #1063/2005. All charges against plaintiff were dismissed on March 2, 2007.

Plaintiffs filed their suit in the Southern District of New York on March 3, 2008. Plaintiff Paul Selinger now brings suit against the City of New York, Detective William Greene, and several John Doe Officers[1], alleging false arrest, malicious prosecution, malicious abuse of process; plaintiff Marsha Selinger brings a derivative claim of loss of consortium.

[1] Defendants have identified the John Doe officers as Lt. Angelo Carbone (retired) and Undercover #2640, and have previously provided this information to plaintiffs.

1. Plaintiff's false arrest claims fail as a matter of law.

As a threshold matter, Plaintiff Paul Selinger's federal claims for false arrest against William Greene and the John Doe defendants are barred by the applicable statute of limitations. Additionally, even if plaintiff's false arrest claim against William Greene had been timely filed, that claim would fail because plaintiff was indicted prior to his arrest.

The statute of limitations applicable to an action brought under 42 U.S.C. §1983 is three years. *See Owens v. Okure*, 488 U.S. 235, 250 (1989), *see also Jaghory v. New York State Dep't of Educ.*, 131 F.3d 326, 331-32 (2nd Cir. 1997). Plaintiff's alleged false arrest claim accrued on March 22, 2005, when he was arrested. The complaint was filed on March 3, 2008, right at the cusp of the three year cutoff for federal claims, but only named the City and John Doe officers. While such a filing does suffice for a *Monell* claim against the City, none of the John Doe officers were identified within the statute of limitations, and therefore all false arrest claims against the officers are barred.

Additionally, plaintiffs cannot amend the complaint to replace the John Does with properly identified defendants, which they have indicated an intent to do[2]. The Second Circuit has held that "Rule 15(c) explicitly allows the relation back of an amendment due to a 'mistake' concerning the identity of the parties (under certain circumstances), but the failure to identify individual defendants when the plaintiff knows that such defendants must be named *cannot* be characterized as *mistake*." *Barrow v. Wethersfield Police Dep't*, 66 F.3d 466, 468-469 (2nd Cir. 1995), modified 74 F.3d 1366 (2nd Cir. 1996). (emphasis added); *see also Malesko v. Correctional Services Corp.*, 229 F3d 374, 382-84 (2nd Cir. 2000), *rev'd on other grounds*, 534 U.S. 61 (2001) (plaintiff's amendment to substitute named individuals in place of "Doe" defendants after the statute of limitations expired does *not* "relate back" and is *untimely* under FRCP 15(c) because plaintiff's addition of newly-named defendants served solely to correct plaintiff's lack of knowledge of the identities of the individual defendants.)

In addition to being time barred, even if plaintiff had timely substituted the John Doe officers as actual persons, plaintiff Paul Selinger's claim for false arrest against William Greene fails because the existence of the indictment at the time of arrest absolutely precludes plaintiff's purported false arrest action. *See Lewis v. United States*, 97 Civ. 624E(Sc), 1998 U.S. Dist LEXIS 9042, at *3-4 (W.D.N.Y. June 18, 1998)(dismissing false arrest action because indictment preceded arrest)(citing *Singer v. Fulton County Sheriff*, 63 F.2d 110, 117 (2d Cir. 1995)). As such, plaintiff has no viable federal false arrest claims.

2. Plaintiff's malicious prosecution and abuse of process claims fail.

To state a claim of malicious prosecution, a plaintiff must show: (1) that the defendant commenced or continued a criminal proceeding against plaintiff; (2) that the proceeding was terminated in the plaintiff's favor; (3) an absence of probable cause for the proceeding; and (4) that the proceeding was instituted with malice. *Kinzer v. Jackson*, 316 F.3d 139, 143 (2d Cir. 2003) (citation omitted). In this case, plaintiff's arrest and prosecution came about because of the Manhattan District Attorney's independent decision to bring charges. It is well-settled that "[t]he exercise of independent judgment by the public prosecutor and his active role in initiating criminal prosecutions may decrease the likelihood that a complaining witness will be considered to have "caused" or "procured" the prosecution, thus defeating grounds for liability under this initial prong of the common law standard. *White v. Frank*, 855 F.2d 956, 962 (2d Cir. 1988). In addition, there is no evidence of actual malice by the police officers. Additionally, defendants submit that plaintiff cannot overcome the legal presumption of probable cause which arises from his indictment. *See, e.g., Rothstein v. Carriere*, 373 F.3d 275, 282-83 (2d Cir. 2004).

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[2] Plaintiffs added William Greene to their First Amended Complaint, which defendants did not consent to, and have indicated their intent to file a Second Amended Complaint adding additional officers. Defendants oppose any amendment as futile for the reasons discussed above.

Finally, plaintiff's abuse of process claim is virtually indistinguishable from plaintiff's malicious prosecution claim. Plaintiff specifically refers to "abuse of (prosecutorial) process" in the complaint. Therefore, as discussed above, neither William Greene or any other Police Officer would have the discretion to cause or procure the District Attorney's prosecution of plaintiff. Any abuse of process claim against William Greene or any John Doe officer must fail.

3. Plaintiff's Monell claims are insufficiently pled.

Plaintiff fails to identify any policy or practice of the City that lead to any constitutional harm. Plaintiff only points to what he calls "systematic flaws" in the City of New York's misconduct review process, but does not city any other instances of such flaws to support his claim. Such claims cannot support municipal liability under *Monell v. Department of Soc. Servs.*, 436 U.S. 658, 690-91 (1978); it is unclear what *Monell* theory plaintiff puts forward.

Such a failure to sufficiently plead a *Monell* claim should lead to dismissal. A motion to dismiss should be granted where a complaint fails to plead enough facts to state a claim that is *plausible* on its face. *See Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1974 (2007). The factual allegations of the complaint must be more than speculative, and show the grounds on which a plaintiff is entitled to relief beyond "labels and conclusions, and a formulaic recitation of the elements of a cause of action." *Id.* at 1964-65. The Second Circuit has interpreted the *Bell Atlantic Corp v. Twombly* case to mandate a "flexible plausibility standard, which obliges a pleader to amplify a claim with some factual allegations in those context where such amplification is needed to render the claim plausible." *See Iqbal v. Hasty*, 490 F.3d, 143, 159-59 (2d Cir. 2007) (internal quotation marks omitted); *see also ATSI Communs., Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007). As such, plaintiff's conclusory *Monell* claim should be dismissed. At a minimum, plaintiff should be required to sufficiently plead his *Monell* claim to meet the standards of Fed. R. Civ. P. 8(a)(2).

4. Most of plaintiff's state law claims are time barred or fail as a matter of law.

Plaintiff Paul Selinger brings state law claims including malicious prosecution, false arrest, defamation, negligent hiring and retention, and negligence; plaintiff Marsha Selinger brings a state law claim for loss of consortium[3].

Under New York law, when suing the City or its employees, a notice of claim is required pursuant to GML §50-e(1)(b). GML §50-e requires that a notice of claim be filed within ninety days of the accrual of the cause of action when a suit is being brought against a municipality and/or its employees. A notice of claim is a statutory precondition to suit against a municipality or any of its officers, agents or employees. GML §§50-e and 50(i)(1)(a). *Barchet v. New York City Transit Authority*, 20 N.Y.2d 1, 6 (1967). Plaintiffs apparently filed a notice of claim on March 30, 2007, over two years after plaintiff's arrest. Therefore, based on this filing, plaintiff's state law false arrest claim, plaintiff's claim for defamation (which stems from the initial accusatory instrument in January, 2005, and Marsha Selinger's derivative loss of consortium claim (which also stems from plaintiff's arrest) are time barred.

Finally, plaintiff's claim for negligent hiring an retention cannot survive as an independent claim when, as here, the individual officers were acting within the scope of employment. *See Kayvan Karoon v. New York City Transit Authority et al.*, 241 A.D.2d 323; 659 N.Y.S.2d 27 (1997).

Therefore, defendants submit that plaintiffs only have cognizable state law claims for malicious prosecution and negligence—all others should be dismissed.

For these reasons, defendants respectfully request leave to file a motion for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c).

Thank you for your consideration of this request.

Respectfully submitted,

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Britta Gilmore, Esq.

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[3] Plaintiff Marsha Selinger does not appear to allege a federal claim for loss of consotrtium, but if the complaint is read to include one, §1983 does not support such a derivative claim. *Stallworth v. City of Cleveland*, 893 F.2d 830, 837-38 (6th Cir. 1990) ("[Section 1983] provides redress to a party suffering injuries from a deprivation of any rights, privileges or immunities secured by federal law...[a] loss of consortium claim does not represent an injury based on a deprivation of [such] rights, privileges, or immunities."); *Ortega v. Schramm*, 922 F.2d 684, 689-90 (1st. Cir. 1991); *Sarmiento v. Texas Board of Veterinary Medical Examiners*, 939 F.2d 1242, 1248 (5th Cir. 1991); *Bright v. City of New York*, 83-CV-7775 (CSH) 1985 U.S. Dist. LEXIS 21042, at *3, (S.D.N.Y. April 4, 1985) ("loss of consortium is a state law tort claim that is not cognizable under section 1983"); *see also Powell v. Gardner*, 891 F.2d 1039, 1047 (2d Cir. 1989).